Supreme Court, U.S.
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No. 97-1353

In The

Supreme Court of the United States

October Term, 1997

WILLIAM FAZIO,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
ARLO SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment requires an elected District Attorney to retain a high-level Assistant District Attorney in an "at-will" position while the Assistant District Attorney runs for election against him.

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INTRODUCTION

In *Fazio v. City and County of San Francisco*, the Ninth Circuit applied well-settled law to the facts of the case to hold that the then District Attorney of San Francisco could dismiss a high-level Assistant District Attorney for running for election against him.[1] The Ninth Circuit's decision broke no new ground, is supported by decisions of this Court, and is consistent with other circuit courts that have addressed the issue.

In *Elrod v. Burns*, 427 U.S. 347, 368 (1976), this Court set forth the parameters of the protection afforded by the First Amendment to public employees dismissed for political reasons. If the public employee is a "policymaker," the employee may be dismissed consistent with the Constitution. In *Branti v. Finkel*, 445 U.S. 507, 518 (1980), this Court clarified that the essential inquiry in deciding whether an employee is a policymaker is whether the employer can demonstrate that political affiliation and loyalty are appropriate requirements for the effective performance of the employee's position. Of course, such inquiry is necessarily fact-based. *See Elrod*, 427 U.S. at 369.

Fazio requests certiorari for two reasons: First, he claims that the Ninth Circuit should have applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the instant case. Second, he claims that the decision of the Ninth Circuit is against public policy.

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[1] Respondents conceded only for purposes of their summary judgment motion that Fazio was dismissed for challenging the District Attorney.

Neither of Fazio's claims has merit. As to the first claim, this Court draws a distinction between terminations for political reasons and terminations based on speech critical of the employer. Generally, in the former circumstance, *Elrod-Branti* applies; in the latter circumstance, *Pickering* applies. *Elrod-Branti* applies here. Fazio never alleged that he was a "whistleblower.

As to the second claim, the Ninth Circuit's decision is supported by the public policy articulated by this Court in *Elrod* and *Branti:* If an elected official had to retain policymaking employees who are disloyal, the mandate of that official to carry out the will of the voters would be thwarted. This view is shared by each of the other circuits that have addressed the issue. These courts have held that all government attorneys save public defenders are policymakers for purposes of *Elrod-Branti.*

The petition for writ of certiorari should be denied.

STATEMENT OF FACTS

In 1995, Fazio decided to challenge the then District Attorney, Arlo Smith, in the next election. Fazio alleged, and Smith conceded for the purpose of his summary judgment motion, that Fazio was dismissed because of his candidacy. At the time of the termination, Fazio was a 20-year veteran of the San Francisco District Attorney's Office who tried some of the highest profile cases in the office. He held the position of "Head Attorney," earned more than $100,000 per year and exercised independent discretion in prosecuting capital cases and other homicides. Because of his position and experience, Fazio

appeared frequently in newspapers as a spokesperson for the office.

The District Attorney in San Francisco is an elected official. Under San Francisco Charter section 3.402, the position of Assistant District Attorney is an at-will position, and no cause is required to dismiss a prosecutor. Also under the Charter, the District Attorney *or his assistants* "shall prosecute all criminal cases in the municipal and superior courts, draw all complaints, and issue warrants for the arrest of persons charged with crime who are to be prosecuted in such courts." *Id.* In other words, assistant district attorneys act in the name of the District Attorney.

Fazio sued Smith and the City and County of San Francisco for among other things, violation of his First Amendment rights. The district court granted summary judgment for the defendants on Fazio's First Amendment claim.[2] The court concluded "that the position of Assistant District Attorney/Head Attorney is such that political affiliation and loyalty are appropriate requirements for effective performance." Pet. App. C at 27a.

The Ninth Circuit affirmed. Based on an analysis of Fazio's position, the panel held that Fazio was a policymaker. Pet. App. A at 12a. Quoting from Judge Posner of the Seventh Circuit, the panel reasoned: "Indeed, '[a] public agency would be unmanageable if its head had to . . . retain his political enemies . . . in positions of

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[2] Trial is set for Fazio's defamation and liberty interest claims for November 1998.

confidence or positions in which they would be . . . exercising discretion in implementation of policy.' " Pet. App. A at 11a, *quoting Wilbur v. Mahan*, 3 F.3d 214, 217 (7th Cir. 1993).[3]

REASONS FOR DENYING THE WRIT

THE NINTH CIRCUIT'S DECISION IS SUPPORTED BY SETTLED LAW AND RAISES NO ISSUES WARRANTING REVIEW.

This Court should deny Fazio's petition for a writ of certiorari. The Ninth Circuit applied established legal principles to the facts of this case in holding that Fazio was a policymaker who could be dismissed based on his political activities. The application of settled principles to particular facts does not justify review by this Court. Further, the result reached below was correct under any reading of this Court's precedent.

A. *ELROD-BRANTI* APPLIES

As this Court held almost twenty years ago in *Branti*, "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517. Thus, elected public officials

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[3] The panel did not consider San Francisco's alternative argument that even if the *Pickering* balancing test applied, the government's interest in avoiding disruption outweighed Fazio's First Amendment interest. *See infra* at 7 n.4.

are not required to retain "policymaking" employees who are politically disloyal.

And this case involves a dismissal based on political disloyalty. As conceded by Respondents for their summary judgment motion, Smith dismissed Fazio because he was running against Smith for office; Fazio was not dismissed for circulating a petition on office conditions as in *Connick v. Myers*, 461 U.S. 138 (1983), writing letters to the press as in *Pickering, supra*, filing a lawsuit alleging discriminatory practices by his employer as in *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), or expressing criticism of his supervisor's practices as in *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997). Indeed, in the district court, Fazio stated in his declaration in opposition to the motion for summary judgment that he "*never publicly criticized Arlo Smith or the office.*" Fazio Decl. at 5 (emphasis added).

Fazio claims that the Ninth Circuit should have applied the *Pickering* balancing test. That test requires balancing the government's interest in the effective operation of the workplace with the employee's speech interests. 391 U.S. 563, 568. But the test applies only when an employer terminates a government employee on the basis of his speech. The test does not apply where, as here, the employer terminates a policymaking employee for challenging that employer in an election. *See Wilbur v. Mahan*, 3 F.3d at 217 (*Elrod-Branti*, rather than *Pickering*, applies when subordinate challenges superior in election); *see also Wallace v. Benware*, 67 F.3d 655, 661, n.8 (7th Cir. 1995) (same); *Brinston v. Dunn*, 928 F.Supp. 669, 671 (S.D.Miss. 1996) (case involving deputy clerk dismissed for running

against boss "is a political patronage case and not a public speech case").

To support his position, Fazio relies on *O'Hare Truck Service v. City of Northlake*, 116 S.Ct. 2353 (1996) and its companion case, *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342 (1996).[4] But in both cases, this Court emphasized the applicability of *Elrod-Branti* when a politically motivated act is in issue. *See O'Hare*, 116 S.Ct. at 2358 ("*Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation . . . "); *Umbehr*, 116 S.Ct. at 2351 (demonstrations of "political hostility" are generally protected "except where political affiliation may reasonably be considered an appropriate job qualification . . . ") (citing *Branti*, 445 U.S. 507). Neither case suggests that this Court has abandoned the *Elrod-Branti* analysis in cases involving political affiliation and loyalty.

Fazio also argues that because this Court did not apply the *Elrod-Branti* analysis in *Connick v. Meyers*, 461 U.S. 138, a case involving an assistant district attorney, the Court has implicitly found prosecutors are not subject to *Elrod-Branti*. Not so.

In *Connick*, an assistant district attorney was terminated because she distributed throughout her office a questionnaire concerning office policy and morale. This Court focused on whether the topics of the questionnaire

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[4] Fazio points to language in *O'Hare* regarding the appropriate test to apply when an employee is dismissed for a mixture of that employee's speech and political affiliation. Pet. at 14. This case involves no such mixture. Candidacy for the electoral position of one's boss is pure politics.

were matters of public concern. *Connick* provides no guidance for the Court here because the assistant was *not* dismissed because of her political affiliation or actions. The opinion contains no discussion about whether assistant district attorneys are policymakers, or whether the claims of assistant district attorneys arguing that they were discharged for exercising their First Amendment rights should be evaluated under the *Pickering* test or the *Elrod-Branti* exception. In short, *Connick* is plainly inapposite.[5]

This case is about a single issue: political loyalty. The sole action in question was Fazio's political candidacy. As Judge Posner stated in *Wilbur*, "The declaration of candidacy in these circumstances is a declaration of war. It makes the candidate a political enemy of his boss whether or not they are members of the same party. . . . " 3 F.3d at 218. It follows that the analysis set forth in *Elrod, Branti,* and their progeny – including *O'Hare* and *Umbehr* – required the Ninth Circuit to examine whether political loyalty is a reasonable requirement to impose on the position of Head Attorney in the District Attorney's Office.

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[5] Although Fazio belabors the distinction between *Elrod-Branti* and *Pickering*, ironically, the result in this case would be the same under either analysis. This Court has observed that disruption in the workplace may be so foreseeable when a high level employee's speech is concerned that no actual disruption need occur before the balance weighs in favor of the government's interests. *Rankin v. McPherson*, 483 U.S. 378 (1997), *reh. denied*, 483 U.S. 1056 (1997); *Connick v. Meyers*, 461 U.S. at 151-152. As discussed in *Wilbur, supra*, it is hard to imagine a more disruptive act than actively campaigning against one's superior.

Applying settled law to these facts, there is only one possible conclusion. Fazio's prosecutorial position was such that it was reasonable for the District Attorney to require his political loyalty. The San Francisco Charter is enacted by the voters. Under the Charter, most San Francisco employees are covered by civil service provisions that bar dismissal for political reasons. But assistant district attorneys serve "at the pleasure" of the District Attorney. San Francisco Charter section 3.402. Their at-will status reflects the voters' intent to keep this small group of employees accountable to their elected boss.

In addition, Fazio's duties as an assistant district attorney were nearly identical to those of the District Attorney. Pet. App. A at 21a. As an assistant district attorney, Fazio represented the District Attorney by his actions in court and his statements to the media. The need for Fazio's loyalty is obvious.

B. THE NINTH CIRCUIT'S DECISION IS SUPPORTED BY PUBLIC POLICY AND UNANIMOUS CIRCUIT COURT DECISIONS.

Fazio also claims that the Ninth Circuit's decision is against public policy. In *Elrod* and *Branti,* however, this Court recognized that there are *two* public policies at work in political affiliation and loyalty cases: First is the unquestioned First Amendment protection for the political beliefs and rights of government employees. Second is the *voters'* right to effective government. *Elrod,* 427 U.S. at 368. Underlying *Elrod* and *Branti* is the fact that modern government frequently requires that elected officials carry out their polices through deputies. If public officials

were required to retain "policymaking" deputies who are disloyal, the voters' right to elect public officials, and to affect change in their government, would be thwarted.

This point is not merely theoretical; it has direct application in this case. San Francisco employs over 100 assistant district attorneys. Each assistant is subject only to broad supervision and guidelines. Each assistant speaks in the name of his elected boss.

Criminal cases often receive heavy press coverage. A single event or decision made by an assistant – a lost case, the release of a dangerous suspect, a plea bargain, a careless remark to the press – can end the elected district attorney's career. Moreover, decisions such as what crimes to pursue or what penalties to seek are deeply imbued with public policy. An elected district attorney cannot entrust these subtle, yet critical tasks to a political foe.

For these reasons, the decision of the Ninth Circuit here comports with the decisions of every circuit that has addressed the issue. "All circuit court decisions – and almost all other court decisions – involving attorneys in government service, other than public defenders, have held that *Elrod/Branti* do not protect these positions." *Gordon v. County of Rockland*, 110 F.3d 886, 890-91 (2d Cir. 1997) *quoting* Susan Lorde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 46-47 (1989); *see also Bavaro v. Pataki*, 130 F.3d 46, 51 (2nd Cir. 1997) (associate and assistant counsel to state health department are policymakers because of their prosecutorial role); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996) (assistant attorney general is policymaker);

Williams v. City of River Rouge, 909 F.2d 151, 154, 155 (6th Cir. 1990) (city attorney not protected against politically motivated dismissal); *Equal Employment Opportunity Commission v. Reno*, 758 F.2d 581 (11th Cir. 1985) (assistant state attorney is in policymaking position); *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) (assistant prosecutors are policymakers); *Monks v. Marlinga*, 923 F.2d 423, 425-426 (6th Cir. 1991) (same); *Mummau v. Ranck*, 687 F.2d 9, 10 (3rd Cir. 1982) (same); *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981) (assistant solicitor is policymaker); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (deputy city attorney is a policymaker).[6]

Fazio suggests that these cases sweep too broadly – that all assistant district attorneys should not be considered policymakers. The merits of that argument are not presented by this case. Fazio was a high-level homicide prosecutor. He concedes that he tried some of the highest profile cases in the office. His employer was entitled to insist upon his political loyalty.

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[6] Fazio's reliance on *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir.), *cert. denied*, 502 U.S. 818 (1991) is misplaced. First, the language that Fazio points to was unnecessary to the resolution of the case. Second, the Ninth Circuit here correctly distinguished *Finkelstein* because the case involved a civil service attorney. Third, *Finkelstein* cited with approval decisions of the Third and Seventh Circuits holding that under *Elrod-Branti*, at-will assistant district attorneys could be dismissed for political reasons without offending the First Amendment.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: March 20, 1998

Respectfully submitted,

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